United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL

75-7290

United States Court of Appeals
FOR THE SECOND CIRCUIT

ACLI INTERNATIONAL, INC.,

Plaintiff-Appellant,

against

S.S. CAMPECHE, her engines, boilers, etc., TRANSPORTACION MARITIMA MEXICANA, S.A., dba MEXICAN LINE,

Defendants-Appellees,

TRANSPORTACION MARITIMA MEXICANA, S.A.,

Defendant and Third-Party Plaintiff-Appellee and Cross-Appellant,

against

PITTSTON STEVEDORING CORPORATION,

Third-Party Defendant-Cross-Appellee.

73 Civ. 1297 HRT

(Caption continued on inside cover)

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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ACLI INTERNATIONAL, INC.,

Plaintiff-Appellant,

against

TRANSPORTACION MARITIMA MEXICANA, S.A., dba MEXICAN LINE and SMITH AND JOHNSON (SHIPPING) INC.,

Defendants-Appellees,

TRANSPORTACION MARITIMA MEXICANA, S.A.,

Defendant and Third-Party Plaintiff-Appellee and Cross-Appellant,

against

PITTSTON STEVEDORING CORPORATION,

Third-Party Defendant-Cross-Appellee.

73 Civ. 5341 HRT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT,
FOR THE SOUTHERN DISTRICT OF NEW YORK

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REPLY BRIEF FOR PLAINTIFF-APPELLANT

Preliminary Statement

All testimony concerning the pre-shipment condition of the cargo in question was before the trial court in either deposition form, or by documentary evidence. Such evidence showed shipment from the shipper's plant in good order and condition, and loading aboard the CAMPECHE in apparent good order and condition.

The question for this court is whether there was sufficient evidence for the trial court to find that the cargo was actually damaged when onloaded into #1 lower hold but not so damaged to be apparent to the crew of the CAMPECHE (who loaded the individual cartons by hand), and that only the damaged cargo found itself into that hold.

In order to find actual damage, the District Court had to find: 1) that the melting point of cocoa butter was below the temperatures at the port warehouse during July 10-13; 2) that only that portion of the shipment which found its way into the #1 lower hold was affected by this heat and 3) the damage would become apparent only during discharge of the cargo aboard the vessel.

(1) Melting point.

Appellee cites Sr. Krauss' testimony as to the melting point of cocoa butter at between 30°-33°C (86°-91.4°F) as the standard. The appellant's expert testified rather extensively that given the type of block that the cocoa butter was in, in order to liquify, it would be necessary to keep the block at 98°F for a sustained period. He also stated that cocoa butter was especially suited as a base for suppositories because it melts at body temperature.

It is entirely possible that the District Court did not believe the plaintiff's expert, indeed the Judge found that

the melting point of the cargo was 86°-97.34°F (a range so wide as to be almost meaningless).

However, the question is not whether one molecule of cocoa butter will melt at a given temperature, but whether a fifty pound block sealed in polyethlene and cardboard will liquefy. The only testimony on this point (that of Mr. Kahan) is uncontradicted. It is also fortified by the physical evidence brought before the judge of an identical carton to the one at bar subjected to 90°F temperature for 10 days under a weight that was, at least as much and probably 2½ times as much as that found aboard the vessel.

It is one thing to discount live testimony on such things as appearance and demeanor of the witness but something else to discount physical evidence before the court.

(2) The #1 hold.

The District Court found "that a good portion of the cartons loaded in the #1 lower hold at Coatzacoalcos were not in good order and condition. . . . Further, it seems more than likely that these particular [damaged] cartons happen to have been loaded aboard the vessel together and found their way into the #1 hold where they were stowed in a melted state either in the middle or down low in the stack."

Earlier, the Judge had found that the cartons had been stowed "at least eight cartons high or more".

The Court does not presume to say just how all of the damaged cartons managed to be loaded in so close proximity within the same compartment and no others were loaded elsewhere. That is left to pure conjecture.

The question remains, however, if the cartons which outturned damaged were in a melted state while in the port warehouse stacked 8 high and transferred to the #1 hold

stowed "at least eight cartons high or more", what additional force acted on the cartons to cause them to crush? The question could not be answered by the carrier who did not inspect the cargo or even take hold temperature readings of #1. What was the temperature of the drums of lemon oil understowing the cocoa butter? Again, the question could or would not be answered by the carrier.

(3) When did the damage appear?

The Court below acknowledged that no damage was apparent during the loading operation. If this is the case, and the hold was fit to receive the cargo, and the cartons were melted on receipt by the carrier, why did not the damage appear immediately upon stacking of the cartons into the hold? Certainly, a shifting downward would have been apparent when the top cartons were loaded and the crew was working in the crawl space between the cartons and the ceiling. Apparently, the Court concluded that the cartons held off a discreet amount of time after the crew had buttoned up the hatch before collapsing.

POINT I

"Judge Tyler chose to infer . . ."

It must be stressed that all the testimony before the District Court concerning the pre-shipment period offered by the plaintiff was in deposition form. It would hardly be in order to infer from the cold type of the written word any of the conclusions that could be drawn from demeanor. Yet, when faced with a clear unequivocal statement taken from deposition transcripts of witnesses directly involved with the cargo in question, juxtaposed with live testimony of a competitor not even vaguely familiar with the facts of the case, Judge Tyler consistently "chose to infer" the truth of the latter's testimony. This

obvious prejudice for live testimony is at best a clear abuse of discretion. Some examples:

A. Preference for the live testimony of Sr. Espana Krauss with regard to the transit time from the shipper's premises to the port of loading. This, even in the face of clear, unequivocal deposition testimony of the shipper as to a two hour transit time and the fact that Krauss had never made the journey by truck and resided some 500 miles from the port.

B. Preference for the live testimony again of Krauss as to the storage of the cocoa butter at the port of loading which enabled the Court to rationalize its inferences that the melting of the cocoa butte ook place prior to loading, i.e., "a good portion of the cargo from July 11, to July 13, was tiered up quite high under the sited, either in a position where there was little circulation of air or where some of the cartons were very close to the metal roof under the blazing sun, or both." This finding totally disregarded the deposition testimony of the carrier's agent that the cartons were stacked 8 high (56 inches) while in storage at Coatzacoalcos. Sr. Krauss had testified that the roof was made of metal and the warehouse was, as a rule "very hot". Other testimony elicited from the shipper had agreed that in the summer at the warehouse the temperature had sometime reached 40°C.

However, to take a rather basic example, water does not freeze merely because it happens to be February in New York. Water freezes because the temperature of that water drops below 32°F, which may or may not occur during any 3-day period in February.

Appellant introduced clear uncontradicted evidence that the atmospheric temperatur at the port of loading did not rise above 87.6°F and clea uncontroverted scientific evidence that the carton could not have melted after only 3 days exposure to that temperature. Indeed uncontradicted

evidence was introduced in the form of an identical carton exposed to temperatures of 90°F for 10 days under 1,000 pounds weight with no deleterious effect on the cargo.

With regard to the reference in the appellant's brief to the height of the warehouse from floor to ceiling, the writer must confess to overzealous advocacy, as that observation was taken from actual presence at the warehouse during personal investigation rather than from testimony in the record below. On the other hand, it is submitted that the court below had before it no evidence to support the finding that there was little circulation of air between the top of the cartons and the ceiling.

Indeed, in order to find that the cartons were placed "very close to the hot sheet metal roofing", the court would have to find that the warehouse was somewhere in the neighborhood of 5-6 feet from floor to ceiling.

In a case decided by this Court in 1951 involving a question of ventilation of cargo while in stow aboard a vessel, the court rejected a Trial Court's findings as based on "pure conjecture" derived indirectly from the testimony. *"So fragile a support for a trial judge's finding will not suffice"*. (Emphasis added.) *American Tobacco Co.* v. *The Katingo Hadjipatera,* 194 F2d 449 (CCA 2, 1951).

"The only eyewitness who testified before the trial judge concerning libellant's conduct was the libellant himself. All other evidence on that subject consisted of statements, by depositions or otherwise, of witnesses, whom the trial judge neither saw nor heard. We are, therefore, in as good a position as the trial judge to evaluate that testimony and draw inferences from it. In such circumstances, it has frequently been held, we are not bound by his findings." *Stokes* v. *U.S.,* 144 F2d 82 (CCA 2, 1944).

"The rule in admiralty cases is that, although an appeal opens the case for a trial de novo, findings of fact are en-

titled to great weight but such a rule is modified where his findings are based wholly upon depositions." *Matson Navigation Co.* v. *Pope & Talbot, Inc.*, 149 F2d 295 (CCA 9, 1945).

It is submitted that with respect to the pre-loading condition of this cargo, all testimony was in the form of depositions or other documentary evidence, i.e., weather reports.

It is further submitted that the only reasonable inferences to be drawn from such testimony is that the cargo was in actual good order and condition when received by the carrier.

POINT II

The burden of proof.

While Judge Tyler's decision was framed in the legal prose that plaintiff failed to make out a *prima facie* case, the clear tenor of the decision indicates that the Court below first found no negligence on the part of the carrier (total ignorance on the part of the carrier of the particulars of the carriage, i.e., physical properties of the cargo, temperature of hold, temperature of understowing drums, etc., notwithstanding) and then found bad order on loading as the only possible explanation for the damage.

It is submitted that the semantical niceties in which the opinion of the lower court is phrased mask a true inversion of the burden of proof.

If the opinion of the lower court is affirmed, a precedent will have been set that states wherever a cartonized shipment of goods possibly subject to deterioration shipped in apparent good order is outturned deteriorated, and the carrier comes forth with absolutely no evidence of the particulars of the carriage, a presumption will be drawn that the goods were damaged upon receipt by the carrier.

The Appellee has raised the point in the *Sabine Howaldt* case that once the carrier has proved it comes within one of the COGSA exceptions, i.e., insufficient packing or inherent vice, the burden is on the plaintiff to show concurrent negligence. The operative words of the decision in *Howaldt* however are "the carrier . . . must prove" this inherent vice or insufficient packing.

It is submitted that a carrier does not "prove" inherent vice or insufficiency of packing by the mere allegation thereof.

Nowhere was it shown that the cocoa butter involved in this action was in any way more likely to melt than ordinary cocoa butter, likewise no proof was offered that the packing was insufficient.

When this court heard the case of *The Shickshinny* on appeal, it stated the rule as to what is "inherent vice"—"Where the goods themselves contain some basic, inherent and hidden defect . . ." 1155 AMC 2171.

It has been said by the 4th Circuit in *The Ensley City* that "the fact that damage to goods arises out of their inherent nature constitutes no defense to the carrier if it appears that the damage would not have occurred but for the carrier's negligence" 1948 AMC 1589.

The Trial Judge here stated in his opinion that while no temperature readings were taken and the stow was not inspected, the damage was not caused thereby. Appellant does not contend that this failure caused the damage but rather that the failure estopped the carrier from claiming inherent vice. See *U.S.* v. *Apex Fish Company,* 1949 AMC 1704 (CCA 9, 1949), in which the inherent vice defense was raised. The pre-shipment facts are remarkably similar to the case at bar.

One of the few distinguishing facts of that case and the case at bar was that in the *Apex* case, hold temperatures

could be ascertained. This indeed proved the difference in the outcome of that case which held for the cargo interests.

If the lower court decision stands in the instant matter, carriers will feel free—indeed compelled to suppress evidence of particulars of conditions of carriage and merely allege inherent vice.

There is a basic principle of law that when a party fails to produce evidence that it alone is in possession of or ought to be in possession of, an inference is raised that the evidence is damaging to that party.

In the Trial Court's drawing of virtually every conceivable inference of fact damaging to the plaintiff, it ignored that legal principle.

CONCLUSION

The judgment below should be reversed and damages awarded to the appellant in the amount of $24,198.38.

Respectfully submitted,

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PITTSTON STEVEDORING CORP.

Third-Party Defendant-Cross-Appellee

State of New York,
County of New York,
City of New York—ss.:

DAVID F. WILSON, being duly sworn, deposes and says that he is over the age of 18 years. That on the 25th day of September, 1975, he served two copies of Reply Brief for Plaintiff-Appellant on Bigham Englar Jones & Houston, the attorneys for Third-Party Defendant-Cross-Appellee by delivering to and leaving same with a proper person in charge of their office at 99 John Street in the Borough of Manhattan, City of New York, between the usual business hours of said day.

David F. Wilson

Sworn to before me this
25th day of September, 1975

Courtney J. Brown

COURTNEY J. BROWN
Notary Public, State of New York
No. 21-5472920
Qualified in New York County
Commission Expires March 30, 1976

Due ~~and timely~~ service of two copies
of the within BRIEF is hereby
admitted this 25TH day of SEPTEMBER 1970

Attorneys for Defts + Third Party Defts Appellee